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In the Supreme Court of the United States

OCTOBER TERM, 1978

FLAT GLASS ASSOCIATION OF JAPAN, ET AL.,
PETITIONERS

v.

CONSUMER PRODUCT SAFETY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE CONSUMER PRODUCT
SAFETY COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A28)¹ is reported at 593 F. 2d 1323. The safety standard with supporting findings promulgated by the Consumer Product Safety Commission (Pet. App. B1-B101), is published at 42 Fed. Reg. 1427 (1977).

¹"Pet." refers to the petition for a writ of certiorari; "Pet. App." refers to the appendix to the petition; "JA" refers to the appendix filed in the court of appeals; "C.A. Br." refers to petitioners' opening brief filed in the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1979. A timely petition for rehearing was denied on April 6, 1979. The petition for a writ of certiorari was filed on July 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly reviewed the entire record before the Commission to determine that the Commission was correct in asserting jurisdiction to promulgate a consumer product safety standard for architectural glazing materials.

2. Whether the court of appeals correctly held that, to the extent wired glass exhibits no significant dissimilarity of function or risk when compared to other architectural glazing materials, the findings articulated by the Commission under Section 9(c) of the Act with respect to application of the standard to architectural glazing materials justify application of the standard to wired glass.

STATUTORY PROVISIONS

Sections 3(a), 7, 9, and 11 of the Consumer Product Safety Act ("the Act"), 15 U.S.C. 2052(a), 2056, 2058, and 2060, are printed at Pet. App. C1-C7.

STATEMENT

1. On May 28, 1974, the Consumer Product Safety Commission began a proceeding under Section 7 of the Consumer Product Safety Act, 15 U.S.C. 2056, to develop a consumer product safety standard for architectural glass (Pet. App. B4). It published a proposed standard on February 11, 1976, and invited comments pursuant to Sections 7 and 9 of the Act, 15 U.S.C. 2056 and 2058

(Pet. App. B5). Along with numerous others, petitioner Flat Glass Association of Japan filed comments on the proposed standard. It recommended that wired glass used in fire doors be exempt from the standard, or, in the alternative, that it be tested at a lower impact level than that proposed (Pet. App. B10-B11, B14-B16). The Association did not claim that architectural glass in general or wired glass in particular are not "consumer products" as defined in the Act and that the Commission therefore lacked jurisdiction to develop a consumer product safety standard for them.

On January 6, 1977, the Commission issued a final safety standard for architectural glazing materials including wired glass (Pet. App. B1-B101).² Under the final standard, glazing materials used in fire doors come within a less stringent testing category than that originally proposed (Pet. App. B16).³ Responding to the specific concerns of the only party to voice a jurisdictional objection, the Commission also stated that architectural glazing materials are produced or distributed "for sale to and/or use or enjoyment of consumers in or around a

²After publishing the proposed standard, the Commission decided to use the term "architectural glazing materials" instead of "architectural glass" because some of the products to be included were made of materials other than glass (Pet. App. B4). The final standard challenged by petitioners in this case was later amended in ways that did not moot the issues (42 Fed. Reg. 31164, 31166; 61859, 61860 (1977); 43 Fed. Reg. 57244 (1978); 44 Fed. Reg. 31208, 31221 (1979). The standard as amended is now published at 16 C.F.R. 1201 *et seq.* (1979).

³In addition, the Commission deferred the effective date of the standard for wired glass used in doors or other assemblies to retard the passage of fire, where such glass was required by federal or local fire ordinance, in order to permit the development of the necessary technology to meet the requirements of both the fire codes and the consumer product safety standard (Pet. App. B14-B15).

*** household or residence, a school, in recreation, or otherwise" and thus are within its jurisdiction (Pet. App. B62-B63).

Petitioners sought review of the safety standard in the court of appeals, pursuant to Section 11 of the Act, 15 U.S.C. 2060. Although they had not raised the issue before the Commission, petitioners argued in the court of appeals that, under Section 3(a) of the Act, the Commission lacked jurisdiction over architectural glazing materials because they are building components whose regulation is preempted by state and local housing codes.⁴ They stated that the issue of coverage "does not involve an issue of fact or administrative discretion, but of law" (C.A. Br. 11). They did not seek leave, as they could have under Section 11(b), 15 U.S.C. 2060(b), to present to the Commission additional data, views, or arguments on the jurisdictional question. And, while they challenged the evidence supporting the Commission's substantive findings, petitioners did not claim any procedural infirmity in the rulemaking by which the standard was promulgated (Pet. App. A2-A3).

2. The court of appeals held that architectural glazing materials, including wired glass, fall within the Act's definition of "consumer product," stating (Pet. App. A8 (footnote omitted)):

The record before the court substantiates that the products covered by the safety standard are customarily marketed as distinct articles of commerce

for sale to consumers or for use of consumers in or around a household or residence, a school, in recreation, or otherwise.

The court rejected petitioners' contention (see Pet. App. A26) that, under Section 9(c) of the Act, 15 U.S.C. 2058(c), which specifies the findings to be made by the Commission before it promulgates a consumer product safety rule,⁵ the Commission was obligated to make a complete set of particularized findings for wired glass, in addition to the findings it made for architectural glazing materials as a class. The court held that, to the extent wired glass was properly included in the category of architectural glazing materials, the findings for the larger product category were sufficient if supported by substantial evidence on the record as a whole. The court remanded the case to the Commission for further consideration whether, with respect to certain product uses, unique characteristics of wired glass are sufficiently dissimilar to those of other materials in the covered product class to warrant exclusions from some portions of the standard (Pet. App. A15-A23); but the court otherwise upheld the standard as meeting the requirements of the Act (*id.* at A25-A26).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or any other court of appeals, and does not warrant review by this Court.

1. Petitioners' claim that the Commission failed to marshal facts to support its jurisdictional determination (Pet. 8-11) is insubstantial. Since petitioners had a chance to raise this point before the agency and the court of

⁴This argument was based on a district court holding that was subsequently overturned by the United States Court of Appeals for the Third Circuit. *Kaiser Aluminum & Chemical Corp. v. CPSC*, 428 F. Supp. 177 (D.Del. 1977), rev'd. 574 F. 2d 178 (3d Cir.), cert. denied, No. 77-1826 (Oct. 3, 1978) (see C.A. Br. 12).

⁵Section 9(c) of the Act is reprinted at Pet. App. C4-C5.

appeals but did not do so, they are foreclosed from arguing it here. *United States v. Lovasco*, 431 U.S. 783, 788 n. 7 (1977); *United States v. Tucker Truck Lines*, 344 U.S. 33 (1952).⁶ In any event, the contention is unsound. The statute does not, as petitioners suggest (Pet. 4), require the Commission to make jurisdictional findings either within "the four corners of the standard" itself or in the preamble to the standard. Indeed, the fact that Congress expressly enumerated in Section 9 of the Act certain findings that the Commission must include in any safety standard, but did not include jurisdictional findings among them, is powerful evidence that Congress saw no need for the express findings petitioners argue for here. 15 U.S.C. 2058(b)-(c). See *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 188 (1978).⁷

⁶Indeed, at the agency level petitioners did not even contest the Commission's jurisdiction, let alone demand detailed jurisdictional findings. Another party did question the Commission's jurisdiction, and the Commission expressly found that it has jurisdiction (Pet. App. B62-B63).

⁷Petitioners claim (Pet. 9) that the decision here is inconsistent on this point with *CPSC v. Anaconda Co.*, 593 F. 2d 1314 (D.C. Cir. 1979), decided the same day by the same panel. Even if the claim had some basis, it would show no more than a conflict within a single circuit, a matter that does not warrant resolution by this Court. Cf. *Davis v. United States*, 417 U.S. 333, 340 (1974); *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). The claim is, in fact, groundless. *Anaconda* was an action brought by the Commission against manufacturers of aluminum wiring under Section 12 of the Act. There was no agency record to review. In the present case the agency compiled a full record that adequately sustained its jurisdiction. See note 8, *infra*.

The court of appeals nonetheless canvassed the entire agency record to determine whether, as petitioner had alleged, the Commission's assertion of jurisdiction was unauthorized. The court's conclusion that the Commission correctly determined that architectural glazing materials are consumer products, and that it accordingly had jurisdiction to promulgate a safety standard for them, is substantiated by the record, and further review of that factual assessment is unwarranted.⁸

Petitioners' suggestion that, as a matter of law, "building components" are outside the Act's definition of "consumer product" (Pet. 10) is groundless. The only courts of appeals to have spoken on the question have taken a contrary view. *Kaiser Aluminum & Chemical Corp. v. CPSC*, 574 F. 2d 178 (3d Cir.), cert. denied, No. 77-1826 (Oct. 3, 1978); *CPSC v. Anaconda Co.*, 593 F. 2d 1314, 1321 (D. C. Cir. 1979) (dictum). A "consumer product" is defined by the Act, Section 3(a), 15 U.S.C. 2052(a), as one that is produced or distributed for sale to or for the use, consumption, or enjoyment of a consumer. There is no statutory exemption for building materials or components, although other express statutory exclusions are written into the Act. 15 U.S.C. 2052(a)(1)(A)-(I); see H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 27-28 (1972). And, in fact, architectural glass was expressly cited as a target of concern when Congress debated the need for this legislation. See 118 Cong. Rec. 31378 (1972) (remarks of Rep. Moss); 118 Cong. Rec. 31382 (1972) (remarks of Rep. Carney).

⁸As the court observed (Pet. App. A8 n.18) the record contains a study indicating that finished architectural glazing products are sold as distinct articles to lumber yards, hardware stores, retail stores, and building material dealers for use in the replacement and remodeling, as well as the home building, markets (J.A. 58a-58c). Contrary to petitioners' assertion (Pet. 5), the study expressly included wired glass among the several architectural glass products surveyed (J.A. 58f).

2. Contrary to petitioners' contention (Pet. 11-14), the decision in this case does not conflict with decisions of the First and Fifth Circuits regarding the requisite record support for Commission finding, under Section 9(c)(2) of the Act, 15 U.S.C. 2058(c)(2), that a standard is "reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with [the] product [subject to the standard]." In *D.D. Bean & Sons v. CPSC*, 574 F. 2d 643 (1978), and *Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F. 2d 831 (1978), the First and Fifth Circuits, respectively, held that, under Section 11(c) of the Act, 15 U.S.C. 2060(c), which mandates a substantial evidence standard of judicial review for the Commission's findings under Section 9(c) of the Act, a reviewing court must find substantial evidence on the record as a whole that each one of a standard's requirements is reasonably necessary within the meaning of Section 9(c)(2) in order to uphold each requirement.⁹ The court of appeals in the present case applied that substantial evidence test to all of the Commission's findings with respect to the standard for architectural glazing materials (Pet. App. A26), and petitioners do not, in fact, contend that the court erred in upholding all of the standard's requirements as applied to materials other than wired glass included in that product category.

Petitioners' contention is essentially that because wired glass is different in some respects from other types of architectural glazing materials, the Commission was required to make a complete set of separate findings for wired glass under Section 9(c)(2) of the Act, to be separately reviewed by the court under the substantial evidence test. As the court of appeals correctly recognized, this amounts to an argument that the Commission cannot treat a range of similar products as a single product class for the purpose of promulgating a standard; and the court properly rejected the argument since, if the Commission lacked such authority, "products of nearly identical design, composition and function" would have to be treated individually, with the result that the Commission "would find itself entangled in needlessly repetitive investigation, rulemaking and adjudication" (Pet. App. A12).

The court acknowledged that to the degree that functional and risk characteristics of a particular product within the class subject to the standard differ significantly from those characteristics of other members of the product class, some variations in the standard's applicability may be warranted (Pet. App. A13-A14). Indeed, the Commission itself had recognized that differences between wired glass and other types of architectural glazing materials justified some differences in the applicability of the standard (Pet. App. A69); and the court ordered a partial remand so that the Commission could determine whether certain unique characteristics of wired glass might warrant some

⁹In *American Petroleum Institute v. OSHA*, 581 F. 2d 493 (5th Cir. 1978), cert. granted, Nos. 78-911 and 78-1036 (Feb. 20, 1979), also relied on by petitioners (Pet. 12-13), the Fifth Circuit applied its *Aqua Slide* test in overturning a standard for occupational exposure to benzene promulgated under the Occupational Safety and Health Act, 29 U.S.C. 651 et seq. Whether that test may properly be applied to OSHA standards is, of course, not an issue in this case.

additional exclusions (Pet. App. A14-A23).¹⁰ With those exceptions the court held that the findings made by the Commission as a predicate for its issuance of the safety standard for architectural glazing materials, including wired glass (Pet. App. B70-B78), were supported by substantial evidence on the record as a whole (*id.* at A25-A26). As noted above, this is the proper standard of review. A challenge to such an assessment of an agency's findings does not warrant review by this Court. *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 309-310 (1974); *United States v. Johnston*, 268 U.S. 220, 227 (1925).

¹⁰Petitioners had urged that wired glass be treated differently because (1) it has dissimilar breakage characteristics, (2) it has higher visibility than clear glass, thus reducing the risk of inadvertent collision, and (3) it exhibits unique functional advantages when used in fire doors (Pet. App. A12). Where the court found that these dissimilarities warranted a closer look for possible exemption for some product uses, it remanded the standard to the Commission for further findings (Pet. App. A15-A23). But to the extent that dissimilar characteristics of wired glass, such as breakage qualities, were irrelevant to the safety hazard posed, the inclusion of wired glass within the standard was properly upheld (Pet. App. A14-A15).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted,

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